IN THE MISSOURI SUPREME COURT

No. SC85460

KENNETH L. KUBLEY,
Appellant/Respondent,

v.

MOLLY M. BROOKS,
Respondent/Cross-Appellant,

and

DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT,
DEPARTMENT OF SOCIAL SERVICES,
Respondent/Cross-Appellant.

Appeal from the Circuit Court of Phelps County, Missouri
The Honorable Ralph J. Haslag, Judge
Case No. CV393-0642DR

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT MOLLY M. BROOKS

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RESPONSE TO THE SUBSTITUTE REPLY OF RESPONDENT/CROSS-APPELLANT DCSE AS APPELLANT IN SUPPORT OF DCSE'S POINT I

No new cases or arguments are raised in DCSE's Substitute Reply Brief under this point. Respondent Brooks has completely argued these issues in her Substitute Brief, so will not waste the court's time in a lengthy response.

In essence, DCSE continues to insist that this case is about "establishing" a support order rather than "modifying" it, as though by so insisting this makes it so. The core issue remains whether the court must use some specific ritualistic language in making an order as to support, or whether it is sufficient for the court to plainly indicate that it has considered child support by mentioning it, preparing a Form 14, and not requiring either parent to pay the other. If the fact that the court considered child support and did not require either parent to pay the other is sufficient to constitute a court order, then DCSE loses Point I.

DCSE also appears to argue that Respondent Brooks should have to distinguish Dye v. Division of Child Support Enforcement, 811 S.W.2d 355, 360 (Mo.banc 1991) from Binns v. Missouri Division of Child Support Enforcement, 1 S.W.3d 544, 547 (Mo.App.E.D. 1999). This is not the case as Binns relies on Dye, and so do Shockley v. Division of Child Support, 980 S.W.2d 173, 175 (Mo.App.E.D.1998) and Garcia-Huerta v. Garcia, 103 S.W.3d 206, 209-211

(Mo.App.W.D. 2003).

DCSE also tries to inject State ex rel Hilburn v. Staeden, 91 S.W.3d 607, 608, but, this case does not turn on the application of the statute, but on its constitutionality. Hilburn in no way invalidates Dye, Binns, Shockley, or Garcia.

As to whether the December 1996 DCSE order of modification was valid, note that no Point on appeal mentioned a complaint as to the trial court's invalidation of that order until now. This is addressed in Respondent Brooks' reply in her Substitute Brief, but it should be noted that the December 1996 order attempting modification occurred at a time when the trial court was already exercising jurisdiction over the parties and subject matter, and DCSE had no State interest in that case at that time as no state funds were being paid in support of the children. Further, the December 1996 attempt did not comply with the statute in existence at that time as to court approval and did not comply with this court's rules requiring an attorney involved at that time. Therefore, there was lack of jurisdiction and no final order or lawful order was ever entered.

RESPONSE TO THE SUBSTITUTE REPLY OF RESPONDENT/CROSS-APPELLANT DCSE AS APPELLANT IN SUPPORT OF DCSE'S POINT II

Appellant DCSE argues it raised the December 6, 1996, order below, but Respondent believes a fair reading of DCSE's points before the Southern District shows no complaint regarding the trial court's decision as to that order. That Respondent Brooks did mention this omission in its reply below in order to distinguish that order from what was appealed does not correct the omission, but instead highlights it.

Appellant DCSE cites Browning v. White, 940 S.W.2d 914 (Mo.App.S.D. 1997) and a series of cases cited therein, at page 919, for the proposition that sovereign immunity applies "even to intentional torts." (DCSE's Substitute Reply Brief, page 8) Those cases do not deal with facts in any way similar to those before this court and all of these cases are appeals decisions which pre-date Palo v. Spangler, 943 S.W.2d 683 (E.D. Mo.App.1997) which is the controlling law as Supreme Court review was denied in May 1997. In distinguishing these cases from Palo it should be noted that none of these cases involve the direct violation of a statutory mandate which is the basis of state action and intended to protect those subject to the act. Further, in every case there is little, if any, analysis of whether the particular act complained of had

been treated as covered by sovereign immunity historically, or the act complained of is described as negligence.

Appellant DCSE apparently argues that these cases mean that sovereign immunity applies to every action against the State regardless of the basis thereof. Further, the implicit argument is that unless an exception is mentioned in the statutory chapter on which most turn, namely Sections 537.600 et seq., then immunity applies. This argument was rejected in Thomas v. City of Kansas City, WD 60046 (Mo.App.W.D.2002) under a section of that opinion entitled "Sovereign Immunity" where the court holds "the statute implicitly, though not explicitly, retains the exception for proprietary functions as to municipalities." This holding and the cases cited therein make clear that exceptions to sovereign immunity which existed prior to the 1977 decision in Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.banc. 1977), as well as those instances where it was never applicable, continue to be the law in Missouri. Therefore, enactment of Sections 537.600 RSMo. et seq. have not created some new statutory law of sovereign immunity and the statute only restores the concept. The only change in the applicability is where this statute specifically says it does so, i.e. in motor vehicle or premise liability cases as subject to insurance dollar limitations set out in the statute.

Palo v. Spangler *supra* is still the law of the case. As is Gavan v. Madison

Memorial Hospital, 700 S.W.2d 124 (E.D. Mo.App. 1985) holding sovereign immunity does not apply to contractual rights.

Next Appellant DCSE argues that State of Missouri, ex rel. Missouri State Highway Patrol v. The Honorable Charles E. Atwell, 2003 W.D. 611421 limits Karpierz v. Easley, 31 S.W.3d 505 (Mo.App. W.D. 2000) cited in Respondent's Reply Brief. However, that case merely refuses a writ of prohibition and remands while expressing the view that the Plaintiffs may have the ability to show on amending their pleadings that sovereign immunity does not apply.

Atwell (as cited by Appellant in its Reply Brief, page 9) unfortunately relies on Kleban v. Morris, 247 S.W.2d 832 (Mo. 1952) and Gas Service Company v. Morris, 353 S.W.2d 645 (Mo. 1962) to assume that the Supreme Court has applied sovereign immunity to actions for money had and received. This is not so.

Kleban v. Morris, 363 Mo. 7, 247 S.W.2d 832 (Mo. 1952) may be distinguished because it involves the attempted recoupment of taxes collected under a statute later declared unconstitutional where the very statute permitted a method of challenging the tax payment within one year. This was not done by Plaintiffs. It should also be noted that this was filed as a class action which may have had a bearing on the court's thinking. The court specifically declined to allow suit because of the existing statutory method for taxpayer recovery which

it viewed as limiting the procedural method for recovery. (Kleban Mo. 19, 20) And, although the court considered the question of whether such a statutory limitation might be an unconstitutional "taking" it declined to find such a 'taking' as the court believed the statutory recovery method coupled with a pending effort of the legislature to appropriate a refund was adequate for constitutional purpose. (Kleban Mo. 19, 20)

Therefore, this case may be distinguished in that it is unrelated to the subject matter of the Brooks' case and because a constitutional remedy for recovery of the funds was in place. Any discussion of sovereign immunity was unnecessary and mere dicta.

This interpretation of the holding in Kleban is supported by a similar interpretation in Gas Service Company v. Morris, 353 S.W.2d 645, 646, 647 (Mo. 1962)

In Gas Service the company attempts to reclaim $17,400.00 paid under protest to the Missouri Director of Revenue as corporate domestication tax. The court held that the company failed to exhaust its administrative remedy by appeal to the State Tax Commission and, therefore, was not entitled to relief. Here, once again the court says, as in Kleban v. Morris which it cites, that the administrative remedy provided was adequate.

Gas Service, even more clearly than even Kleban, on which it relies, can

be read to have little to do with sovereign immunity. Each case ultimately holds that there was adequate remedy at law under statutory administrative review procedure for recovery of wrongfully taken taxes. Thus, there is no right to recovery by means other than the statutory method. The discussion of sovereign immunity in each case is not essential or necessary to the discussion so that it becomes mere dicta in reaching the outcome. Therefore, both cases are not controlling in this matter. Morever, these cases deal with taxation, a distinct area of the law with a separate historical background as to when and how recovery is available.

Cross-Appellant ignores the more recent case of V.S. DiCarlo Construction Co., Inc. v. State, 485 S.W.2d 52 (Mo. 1972) where the Supreme Court recognized the State's obligation to honor its contracts as an implied waiver of sovereign immunity. Further, in that case the Supreme Court at pages 56 and 57 of the opinion discusses the many "...sue and be sued..." statutory provision as waiver of sovereign immunity. The court concludes that those are broad enabling statutes which "... provide a continuing waiver of sovereign immunity..." page 56. And, the court holds that even where no such "...sue and be sued..." statutes apply to a given agency, the existence of such statutes for other agencies do not imply that in contract cases, for example, waiver is not implied by the contract itself or by other statutory provisions.

In this case, the agency, Division of Child Support Enforcement, has a "...sue or be sued..." provision under Section 454.400.2(1) RSMo. 1997, which was in effect at all relevant times. Therefore, under the language in V.S. DiCarlo this alone would result in the waiver of sovereign immunity. Respondent nevertheless believes that such waiver is not only expressed by the aforementioned statutory "...sue or be sued..." authority, but by the very nature of its activities. Where an agency is authorized to set out an amount of money a private citizen is to pay for the support of the citizen's family and to collect it, that agency functions in much the same way as the contracting authority of any agency. All parties to the transaction have obligations, benefits, and rights. The State cannot be held under our system of laws to be clothed with an arbitrary right to take money for the private good of another without responsibility for its actions. This is more than a social contract, it is also an economic contract intended for the benefit of the parents, children, and State. If the State cannot be required to function within its statutory framework, then no one else can rely on it. The resulting effect, similar to that in contractual matters, is likely to be that few, if any, persons will cooperate with the Division just as few would enter into a contract with the State if they expected the State could default with impunity.

This distinction is not one of mere fairness of the judgment process as

where father thinks he should pay $100.00 per month child support and the agency rules $200.00 per month. This is an issue of playing by the statutory rules. Had the Agency done so, no support order against Respondent Brooks would have been entered. That was the lawful expectation of Respondent when Judge Haslag entered his dissolution order. That would have been the outcome but for DCSE's breach of its lawful obligation. If one party to a dissolution or child custody case is allowed to enter into an agreement and the other to avoid it by involving DCSE, honest citizens will be discouraged from making reasonable agreements such as that originally made by the Kubleys to share custody in their children's best interest.

Finally, in further support of Respondent Brooks position see Bachtel v. Miller County Nursing Home District, SC 84835 (Mo.banc 2003). While this case deals with tort immunity waiver it does stand for the proposition that waiver of sovereign immunity is often implicit under recent statutory enactments rather than explicit and that such waiver, even in a tort action, can and does occur.

RESPONSE TO THE SUBSTITUTE REPLY OF RESPONDENT/CROSS-APPELLANT DCSE AS APPELLANT IN SUPPORT OF DCSE'S POINT III

In DCSE's Reply Brief, Cross-Appellant DCSE argues that the cases cited by Respondent Brooks do not have the same facts as the present case. Yet, DCSE fails to acknowledge the central point. In every one of those cases the parties were allowed to appeal, even though they took advantage of the judgment or complied with it without any coercion or with little detriment to themselves. They, in effect, had their cake and ate it too, as the saying goes, yet estoppel did not apply. Here, Respondent Brooks had wages garnished, taxes intercepted, and was cited in contempt and jailed, all involuntary collection methods. Should she be denied review? She suggests that to do so would be contrary to the reasonable and fair doctrine set out by the cases she has cited.

Denial of review by estoppel should be applied, if ever, only in extreme cases not where real harm has occurred. For, it must be remembered this matter involves children and the parent-child relationship. Respondent Brooks was deprived not just of money, but of the companionship of her children and under all the circumstances her fight to regain both, as described in the testimony and set out by the trial judge, show uncommon determination. The undisputed fact is that the only way she could get to the point where she finds herself now was to

work for and obtain her education (in spite of the roadblocks and abuse heaped upon her) so as to be able to employ counsel to help her. This was an act which required time and some knuckling under to unlawful demands, but one which does not speak of some type of wilful complicity in the wrong which was done her, nor neglect on her part. She had to earn the means to fight the abuse because as Judge Haslag found, she was denied any form of representation be it public defender, legal aid, or court appointed counsel. This in spite of the fact that she had an absolute right to court appointed counsel in the contempt.

At the conclusion of its reply, DCSE tries to excuse its failure to raise the estoppel defense by blaming Respondent Brooks' pleadings. Yet, DCSE had already filed motions and had arguments on them prior to filing the estoppel motion, a relatively short time before trial. It did not in any of those motions request a more definite statement, it simply refused to plead. And, accordingly the case went to trial with no answer filed by DCSE. DCSE cannot now claim it was harmed because it did not understand pleadings of which it had not complained and by which it evidently was not harmed, but with which it went to trial.

RESPONSE TO SUBSTITUTE REPLY OF DCSE TO MOLLY BROOKS' POINT II AS CROSS-APPELLANT

DCSE tries to convert Cross-Appellant Brooks' Point II as Cross-Appellant to an argument over <u>adequacy of damages</u> from its true basis which is a <u>mistake of law</u>. The trial judge gave no consideration to any amount of damages other than the return of money had and received. That this is so, has been argued in Cross-Appellant Brooks Point II already and is evident directly on the face of the judgment. That the trial judge failed to consider any damages other than those arising out of Cross-Appellant's jailing is also evident on the face of the judgement. Thus, the trial judge made two errors. He failed to consider other consequent damages such as lost work, school time, and companionship of the children and he denied damages which were the consequence of the jailing because of a mistake of law. It is obvious on the face of the judgment that Judge Haslag believed that the fact that Cross-Appellant Brooks was jailed for five days for failure to appear at a hearing for which she received no notice, was an unforeseeable event and not chargeable to DCSE or Mr. Kubley.

Yet, the trial judge overlooked the purpose of the hearing. It was a contempt for non-payment of support. Such an action contemplates jail. Indeed, in such cases it is the threat of jail which constitutes the core threat

intended to collect money. Unless DCSE and Mr. Kubley knew that their turning this matter over for enforcement by contempt would not result in incarceration because the complaint was false, they had to expect that incarceration might occur. They were seeking it. And, had they not instigated this action, no incarceration could have occurred.

The trial court has made two mistakes of law, which resulted in no consideration as to the amount of damages. Instead, the mistakes were in regard to whether damages were available. That aspect of the case should be remanded with instruction to assess damages.

CONCLUSION

The trial court has correctly found that Kenneth Kubley and DCSE are jointly and severally liable to Molly Brooks for damages in the amount of money it found had been wrongfully taken from her, plus interest, and should be affirmed in that part of its judgment. Since the trial court found all the wrong doing necessary to support consequential damages over and above the money taken, and since the record reflects adequate evidence for such an assertion, the case should be remanded in part with instructions to assess consequential damages against Kenneth Kubley and DCSE.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06(c), the undersigned certifies that, to the best of his knowledge and belief:

1. Respondent/Cross-Appellant's Substitute Reply Brief is in compliance with the limitations contained in Rule 84.06(b).

2. Respondent/Cross-Appellant's Substitute Reply Brief contains 3,579 words.

3. Respondent/Cross-Appellant's Substitute Reply Brief contains 464 lines monospaced type.

4. The diskette upon which the electronic copy of Reply Substitute Brief Respondent/Cross-Appellant's has been filed has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned, counsel of record for Molly M. Brooks, Respondent/Cross- Appellant in Case Number SC85460, certifies that two copies and one 3½ inch diskette of Respondent/Cross-Appellant's Substitute Reply Brief in this cause have been mailed, postage paid to Stephen W. Daniels, Attorney at Law, 610 N. Olive, Rolla, Missouri 65401, and Bart A. Matanic, Assistant Attorney General, Broadway Building, 6th Floor, P.O. Box 899, Jefferson City, MO 65102, on the 12th day of December, 2003.

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APPENDIX